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No. 82-317

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JAMES KNIGHT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. IS IT PROPER TO PERMIT A KEY GOVERNMENT WITNESS TO TESTIFY TO THE OUT-OF-COURT DECLARATIONS OF CO-CONSPIRATORS UNDER THE CO-CONSPIRATOR EXCEPTION TO THE DEFINITION OF HEARSAY, *FEDERAL RULES OF EVIDENCE 801 (d) (2) (E)*, PRIOR TO PRESENTATION OF ANY INDEPENDENT EVIDENCE THAT A CONSPIRACY EXISTED OR THE MEMBERSHIP OF THAT CONSPIRACY?

II. DOES AN ACTUAL CONFLICT OF INTEREST BETWEEN A DEFENDANT AND HIS COUNSEL EXIST WHERE IT IS SHOWN THAT, AT THE TIME OF TRIAL, THE DEFENDANT AND HIS ATTORNEYS WERE JOINTLY UNDER ACTIVE INVESTIGATION FOR POSSIBLE VIOLATIONS OF FEDERAL CRIMINAL LAW AND POTENTIAL CONTEMPT OF COURT ARISING FROM THE ATTORNEYS' POSSESSION, TRANSFER, AND DESTRUCTION OF THE GOVERNMENT'S TRIAL OUTLINE AND A GRAND JURY TRANSCRIPT AND THE DEFENDANT, WHO WAS A POTENTIAL GOVERNMENT WITNESS AGAINST HIS ATTORNEYS, WAS NEVER INFORMED OF NOR ENTERED A WAIVER OF THE RIGHT TO INDEPENDENT COUNSEL?

PARTIES TO THE PROCEEDINGS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

PLAINTIFF:

UNITED STATES OF AMERICA

DEFENDANTS:

EUGENE MASON ALLEY
ROBERT "BOBBY" TAYLOR
JAMES KNIGHT
WAYNE DREWRY
VERNON MAHANA

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Exhibit D 15a
Opinion of the United States Court of Appeals for the Sixth Circuit filed on June 22, 1982.

Exhibit E 17a
Relevant portions of the Transcript of Proceedings at the trial of this case in the United States District Court for the Eastern District of Kentucky.

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No. .....

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JAMES KNIGHT,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, James Knight, by his counsel, prays that a Writ of Certiorari issue to review the Judgments and Orders of the United States Court of Appeals for the Sixth Circuit entered in this case on August 12, 1981, and June 22, 1982.

OPINIONS BELOW

No written Opinion regarding the first issue in this case was filed or published by the United States District Court for the Eastern District of Kentucky. The oral ruling of

the Court is at Pages 19a, 20a of the Appendix to this Petition. The Memorandum Opinion of the United States District Court for the Eastern District of Kentucky following remand is at Pages 4a-11a of the Appendix to this Petition and has not been officially reported to date. The Opinions of the United States Court of Appeals for the Sixth Circuit affirming the Judgment of the District Court are at Pages 12a-15a and Pages 15a-17a of the Appendix to this Petition and have not been officially reported to date.

JURISDICTIONAL STATEMENT

The date of the Judgment of the Court of Appeals for the Sixth Circuit and the date of its entry is June 22, 1982. (App. 15a) Jurisdiction of this Court is invoked under *28 U.S.C. § 1254(i).*

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES OF EVIDENCE

AMENDMENT SIX:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him, . . . and to have the assistance of counsel for his defense."

RULE 104 (a):

> "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the Court, subject to the provisions of Subsection (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges."

RULE 104 (b) :

> "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon or subject to the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

RULE 801 (d) (2) (E) :

> "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

STATEMENT OF THE CASE

Petitioner and four others were indicted in the Eastern District of Kentucky for conspiracy, mail fraud, wire fraud, and interstate transportation of stolen property *(18 U.S.C. §§ 371, 1341, 1343, 2314)*. The charges arose out of a series of four business transactions in which the Defendants allegedly defrauded finance and leasing companies by purchasing encumbered mining equipment and then reselling that equipment without notification to the buyers of the interests of the finance or leasing companies. On March 5, 1980, a jury found Petitioner guilty of conspiracy and of the substantive counts relating to two of the transactions, those involving the High Carbon Coal Company and the J & S Coal Compay. On March 19, 1980, Petitioner was sentenced to five years imprisonment and fined $10,000.00 on the conspiracy count. Sentencing on the substantive counts was suspended and the Petitioner was placed on probation for a five year period commencing upon his release from incarceration.

The Government's case rested primarily on the immunized testimony of J. R. Durham, the self-admitted mas-

termind and prime mover in these transactions, and the testimony of Vernon Mahana, an indicted Defendant who had fronted the transfers of equipment in three of the transactions. The major portion of both men's testimony related to hearsay in the form of conversations with and statements made by James Knight's Co-Defendants, all of which were held, over objection, to be admissible against the Petitioner under *Fed.R.Evid 801(d)(2)(E)*, the co-conspirator exception. Under the ruling by the Sixth Circuit in *United States* v. *Vinson*, 606 F.2d 149 (1979), all of this hearsay evidence was allowed to be admitted prior to any findings by the Court that a conspiracy existed of which the out of court declarant and the Defendant were members and that the statements were made in furtherance of and during the course of that conspiracy. Under *Vinson*, the Trial Court was permitted to wait until the close of the Government's case to make general findings of these facts without any statement of the evidence used or not used in support of those findings. Under *Vinson*, the Trial Court was also permitted to use the hearsay communications themselves as the basis for these findings.

Outside of the evidence admitted under *801(d)(2)(E)*, the only evidence connecting Petitioner to the High Carbon Coal Company transaction was proof that he, as an independent equipment hauler, had hauled encumbered equipment from the High Carbon mining site and had been compensated for his services. With regard to the J & S Coal Company transaction, the non-hearsay proof consisted of showing that Knight was the ultimate recipient of three pieces of encumbered mining equipment and that he had, apparently, traded his ownership of a racetrack to two of the Co-Defendants in exchange for them.

Prior to the commencement of trial, the Assistant U.S. Attorney prosecuting the case, Robert Trevey, discovered

that the Grand Jury Transcript of J. R. Durham and the Government's trial outline were missing from his briefcase. Petitioner's retained attorneys, W. L. Rose and Gary Crabtree, came into possession of the papers and, after reviewing them, transferred them to Thomas Fowler, the Attorney for Wayne Drewry, a Co-Defendant. Fowler and Drewery were staying in Petitioner's home and, while Knight was driving them there, the three men stopped and allowed another Co-Defendant, Eugene Alley, to copy the Grand Jury Transcript. The next day a Search Warrant was executed on Alley's office and his copy of the Transcript was seized. Alley and his wife were arrested for possession of stolen government property. The U.S. Attorney's Office, through Trevey, and the F.B.I. initiated an investigation. On the night of Alley's arrest, Knight's Attorney, W. L. Rose, phoned Attorney Fowler at Knight's home and told Fowler to destroy the originals, which Fowler did. Knight, who is illiterate and never had possession of the papers, was a witness to these events. In the intervening five days before trial, the Government investigation focused increasingly on the Petitioner, his two Attorneys, and Attorney Fowler. Rose, who had falsely denied his possession of the papers when questioned by Assistant U.S. Attorney Trevey, told Knight that they all could get charged and that the Attorneys could lose their licenses. When the Prosecutor sought to interview Knight regarding the papers during the trial, Rose, acting as Knight's counsel, instructed Petitioner to take the Fifth Amendment. However, after Alley gave a complete statement to the Government, Petitioner's Attorneys both changed their stories and admitted possession of the original documents (but not their destruction or theft).

The Trial Court was made aware of the active investigation of certain Defendants and their Attorneys but de-

cided to proceed with the trial and to set the matter of the Government documents aside until its completion. The Petitioner was never informed of his right to independent counsel nor did he enter any waiver of that right. Immediately upon receiving a verdict, the Court Ordered the U.S. Attorney's Office to investigate and report on whether there was any theft of Government property or contempt of Court by Petitioner's Attorneys. This report was received by the Court on the date of Petitioner's sentencing and subsequently an opinion was issued finding the Attorneys' conduct reprehensible but not sufficient grounds for contempt or further charges (Neither the Court nor the U.S. had learned of Rose and Fowler's destruction of the papers).

After the Sixth Circuit remanded the Petitioner's case to the District Court for further investigation into potential conflict, the full sequence of events was set forth in a series of hearings and made into findings by the Trial Court (App. 4a-11a). The District Court concluded that these facts did not show an actual conflict of interest and that, even if it did, Knight was not prejudiced by the conflict (App. 4a). This decision was affirmed by the Sixth Circuit (App. 15a-17a).

ISSUE ONE

A. SPLIT AMONG COURTS OF APPEALS PRESENTED:

The United States Circuit Courts of Appeal are in conflict regarding the appropriate method by which to admit testimony under the exception from the definition of hearsay for co-conspirator's statements found in *Federal Rules of Evidence 801(d)(2)(E)*. The Supreme Court

Opinions addressing this issue pre-date the *Federal Rules of Evidence*. *United States* v. *Nixon*, 418 U.S. 683, 701, n.14 (1974); *Glasser* v. *United States*, 315 U.S. 60 (1942). The United States Court of Appeals for the Sixth Circuit is at odds with most of the other circuits on the issue presented by this case. The conflict among the circuits is posed precisely by the case presently before the Court.

The co-conspirator exception to the definition of hearsay allows out-of-court statements to be admitted into evidence if, at the time the statement was made, a conspiracy existed, the out-of-court declarant and the defendant were members of the conspiracy, and the statement was made in furtherance of the conspiracy. *Fed. R. Evid. 801(d)(2)(E)*. The disagreement among the circuit courts is two-fold:

1) Most of the circuit courts require that the admissibility of the hearsay testimony be determined on the basis of evidence other than the hearsay itself. *Compare, United States* v. *Stipe*, 653 F.2d 446, 448 (10th Cir., 1981); *United States* v. *Alvarez-Porras*, 643 F.2d 54 (2nd Cir., 1981), *cert. denied*, 102 S.C. 146 (1981); *United States* v. *James*, 590 F.2d 575, 579 (6th Cir., 1979) (en banc), *cert. denied*, 442 U.S. 917 (1979); *United States* v. *Macklin*, 573 F.2d 1046 (8th Cir., 1978), *cert. denied*, 439 U.S. 852 (1978), and *United States* v. *Snow*, 521 F.2d 730, 733 (9th Cir., 1975), *cert. denied*, 423 U.S. 1090 (1976) with *United States* v. *Vinson*, 606 F.2d 149, 155 (6th Cir., 1979) and *United States* v. *Martorano*, 557 F.2d 1, 12 (1st Cir., 1977), *cert. denied*, 435 U.S. 922 (1978).

2) The Courts of Appeal also diverge on whether to require proof of the conspiracy prior to admission of the hearsay. *Compare, Stipe*, 653 F.2d at 448 and *James*, 590 F.2d at 581 with *Vinson*, 606 F.2d at 154.

This split among the circuits is presented precisely in this case because: (1) the trial court admitted co-conspirator

hearsay testimony prior to admission of any other evidence; (2) the trial court relied upon the hearsay itself in making the determination to admit the testimony without admonition to the jury at the end of the government's case; and (3) the only evidence, other than the hearsay against Petitioner, was as consistent with innocence as with guilt. The United States Attorney exploited the defective *Vinson* holding to its greatest extent by putting on the mastermind and kingpin of the alleged conspiracy as the first witness in the case. Since *Vinson* was the controlling opinion in Petitioner's case, the kingpin of the conspiracy was allowed to testify regarding statements of third parties alleged to be members of the conspiracy prior to any independent evidence that a conspiracy existed or that Petitioner was a conspirator.

B. SIXTH AND FIRST CIRCUIT RULES ARE DEFECTIVE:

1. Consideration Of Hearsay In Determination Of Its Admissibility Contradicts Supreme Court Opinions And Other Courts Of Appeal.

The Supreme Court has twice held that proof of the necessary foundation for admission of hearsay under the co-conspirator exception must come from evidence other than the hearsay itself. *United States* v. *Nixon,* 418 U.S. 683, 701, n.14 (1974); *Glasser* v. *United States,* 315 U.S. 60, 74-75 (1942). The rationale of these cases is inescapable — if hearsay is inherently unreliable, then it cannot, of itself, justify being excepted from the general rule excluding hearsay; that is to say, inherently incompetent evidence cannot pull itself up to the level of competence by its own bootstraps. *Glasser,* 315 U.S. at 74-75.

As pointed out above, the Sixth Circuit has rejected the *Glasser - Nixon* holdings on this point.

Petitioner was convicted on the basis of hearsay testimony admitted under the exception presently being discussed and on the basis of the fact that he helped move heavy equipment. The proof showed that Petitioner hauled heavy equipment for his livelihood and that he received compensation for the equipment he moved in this case. Without the inherently unreliable hearsay admitted in this case, it is just as consistent with Petitioner's innocence as his guilt that he moved this heavy equipment for compensation. Only by considering the hearsay in determination of its admissibility was the hearsay admitted and only by its admission was Petitioner convicted.

2. Order Of Proof Allowed By Defective Rules Is Not Economical Or Reasonable

In *Vinson*, the Sixth Circuit allows the trial court to admit hearsay admissible only under this exception on the condition that the foundation for its admissibility later be established. As noted, there is a clear split among the circuits on this point; however, *Vinson* and its cohorts are unjustifiable in their risk of unfair convictions. If the trial court admits the hearsay conditioned upon establishment of the required foundation later, the trial court has only a Hobson's Choice when the foundation is not provided later — declare a mistrial or attempt to cure the error by instruction to the jury. An instruction to a jury to disregard testimony days or weeks after the testimony is given is fruitless and of extremely dubious quality. On the other hand, declaration of a mistrial for this reason is an outrageous and unreasonable waste of judicial resources when ordering of the proof could easily rectify the situation.

Any court that conditionally admitted such hearsay testimony would be constrained to admit the hearsay for all purposes when faced with the situation the trial court faced in this situation. After many witnesses and several weeks of trial, the trial court had to decide whether to admit the testimony, give the jury a useless instruction to disregard the testimony or declare a mistrial. Except in flagrant cases, the trial court's decision in this situation is all too predictable. The Fifth Circuit in *James* and the Tenth Circuit in *Stipe* recognize these problems and erect a preferential order of proof. These decisions provide a fair trial and conviction while *Vinson* does not.

ISSUE TWO

THE ACTUAL AND REVERSIBLE CONFLICT OF INTEREST OF TRIAL COUNSEL:

The Court should grant certiorari because the Sixth Circuit Court of Appeals has decided the federal issue of what constitutes an actual and reversible conflict of interest between a Defendant and his Attorney in a way that is in conflict with the decisions of this Court in *Wood* v. *Georgia,* 450 U.S. 261, 67 L.Ed.2d 220, 101 S.Ct. 1097 (1981); *Cuyler* v. *Sullivan,* 446 U.S. 335, 64 L.Ed.2d 233, 100 S.Ct. 1708 (1980), and *Holloway* v. *Arkansas,* 435 U.S. 475, 55 L.Ed.2d 426, 98 S.Ct. 1173 (1978).

In *Wood* v. *Georgia,* this Court vacated and remanded the decision of a state Court of Appeals. The record revealed that certain bookstore and theatre employees who were challenging a state court's revocation of their probation for failure to pay fines arising from obscenity convictions had been represented throughout the proceedings by legal counsel both hired by and paid for by their employer. This Court indicated that the possibility of a conflict of interest was sufficiently apparent at the time of the revoca-

tion hearing to impose a duty on the Trial Court to inquire further. The Trial Court was instructed that if there was an actual conflict of interest and no valid waiver of the right to independent counsel, then a new hearing must be held. In its ruling, this Court stated:

> "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." 450 U.S. at 271, 67 L.Ed.2d at 230.

At Footnote (18), the Court cited its previous decision in *Cuyler* v. *Sullivan* (supra) as "mandat[ing] reversal when the trial court has failed to make an inquiry even though it knows or reasonably should know that a particular conflict exists" 450 U.S. at 272, 67 L.Ed.2d at 231.

In *Cuyler* v. *Sullivan,* this Court had considered the question of habeas corpus relief for a state prisoner who alleged that his two defense lawyers, who also represented co-defendant, were subject to the potential conflict of interest arising from multiple representation. In that case, the record was silent, as neither the defendant or his attorneys brought up the question of a conflict of interest. While denying habeas corpus relief on the grounds that actual conflict of interest rather than possible conflict of interest must be shown, this Court stated that:

> "Defense counsel have an ethical obligation to avoid conflicting representations and to advise the Court promptly when a conflict of interest arises during the course of trial" 466 U.S. at 346, 64 L.Ed.2d at 345.

This finding was the basis for the further holding that, in state cases where neither the defense counsel or the defendant objects to multiple representations, the Court, unless it knows or reasonably should know that a particular conflict exists, can assume without further inquiry that the multiple representation entails no conflict or that the law-

yer and his clients knowingly accept such risk of conflict as may exist.

In *Holloway* v. *Arkansas,* (supra) this Court reversed the conviction of a defendant who had to share appointed counsel with two co-defendants. Before trial, that attorney had moved the court for appointment of separate counsel because of a risk of conflicting interests. It was held that, in the absence of any prospect of dilatory practices, the Trial Court's failure to either appoint separate counsel or to take adequate steps to ascertain whether the risk of conflict was too remote to warrant separate counsel deprived the Co-Defendants of the guarantee of assistance of counsel under the Sixth Amendment. This Court stated:

> "Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. For example, in this case it may well have precluded defense counsel . . . from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable . . . examples can be readily multiplied. The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." 435 U.S. at 490, 55 L.Ed.2d at 438.

The present Petitioner's case, because of the remand for further proceedings at which the Defendant, his former attorneys and the Prosecutor all testified, presents a clear record for determination of whether or not an "actual conflict of interest" requiring reversal existed between Knight and his attorneys. The District Court has made a finding of fact that, at the same time the Petitioner was on trial, his attorneys were also using their position as his legal counsel to advise him to take the Fifth Amendment and thereby

prevent him from revealing acts of wrongdoing he had witnessed them committing, which acts were then under active investigation by the Federal Government. Moreover, the Assistant United States Attorney prosecuting the Petitioner at his trial was the same Prosecutor whose property had been diverted and who had initiated the investigation of the Defendant's attorneys.

The situation, as outlined by the District Court's findings, presented this Petitioner's attorneys with conflicting interests in making the following decisions during his trial:

> (1) Do they inform the Trial Court of the specifics of their conflict when to do so would constitute an admission of their own wrongdoing possibly subjecting them to indictment, criminal contempt or loss of their licenses to practice law? The record reveals that Knight's attorneys remained silent, even when the matter was brought up during trial.
>
> (2) Do they advise their client of the specifics of their conflict and his right to ask the Court for independent counsel when to do so could free him from their control which they were using to prevent his revelation of their misconduct? The record reveals that Knight's attorneys never discussed their conflict of interest or the right to independent counsel with their client.
>
> (3) Do they advise their client to assist the United States in the pending investigation by giving them information he had or do they seek to negotiate on his behalf for immunity, sentence concessions, or favorable consideration at sentencing when to do so could result in the full disclosure of their own misconduct? The record reveals that Knight's attorneys advised their client to remain silent, by asserting his *Fifth Amendment* privilege, and never sought any benefit from the Government or the Court in return for his possible cooperation in the investigation.

(4) Do they advise Knight to testify in his own behalf at trial when this might be considered as a waiver of Fifth Amendment rights and his continued silence was protecting them in the ongoing investigation? The record reveals that Knight's attorneys advised their client not to take the stand in his own defense.

(5) Do they aggressively defend Knight when to do so might run the risk of antagonizing a Prosecutor who had the potential power to exercise his charging discretion in a manner having adverse and potentially fatal effects on their careers? The record reveals that Knight's attorneys put on no witnesses or evidence in his defense.

(6) Do they aggressively cross-examine James Durham, interview witnesses listed on the Government's trial outline, or strenuously seek acquittal when to do so might arm the Government with the argument that it was harmed by the attorneys' wrongful pretrial possession of Durham's Grand Jury Transcript and the Government's outline of proof? The record reveals that both Knight's attorneys subsequently argued at the contempt hearing (wherein the Trial Court received the Government's investigation report) that no harm had been done to the Government by their wrongful actions since the Petitioner and his Co-Defendants were ultimately convicted.

This Court has not defined the term "actual conflict of interest." However, the Fifth Circuit, in reversing a conviction where a defendant's attorney was simultaneously representing the Prosecutor in an unrelated civil action, defined it clearly and well:

> "An actual conflict of interest occurs when a defense lawyer places himself in a situation inherently conducive to divided loyalties. . . . If a defense attorney owes duties to a party whose interests are adverse to

those of the defendant, then an actual conflict exists." *Zuck* v. *State of Alabama,* (CA5, 1979) 588 F.2d 436 at 436. See also, *Castillo* v. *Estelle* (CA5, 1974) 504 F.2d 1243, (reversing a conviction where Defendant's attorney was also representing a Government witness in an unrelated case.)

In this Petitioner's case, his own attorneys were the parties whose interests were adverse to his own. Rose and Crabtree were in the untenable position of representing a client who was a potential government witness against them. The Sixth Circuit was clearly in error when it found no actual conflict of interest in such a situation. Both the Lower Courts and the attorneys who are its officers need further guidance from this Court as to appropriate procedure when a lawyer's own interests come into opposition with those of his client, including guidance as to when it is error for the trial court to fail to inquire further or obtain the defendant's waiver on the record.

CONCLUSION

The decision of the Sixth Circuit in this case and in *Vinson* regarding the necessary predicates for admissibility of evidence under *Fed. R. Evid. 801(d)(2)(E)* are at odds with the decisions of other Courts of Appeal and this Court's decision in *Glasser* v. *United States.* The passage of *Fed.R.Evid. 104* has caused the lower federal courts to struggle with the question of the continued validiy of *Glasser* and these courts need the guidance to be gained from a Supreme Court Opinion. Furthermore, the decision of the Sixth Circuit that the facts found by the District Court on remand did not demonstrate an "actual conflict of interest" between this Petitioner and his trial attorneys

at the time of his trial is at odds with this Court's decisions in *Wood* v. *Georgia; Cuyler* v. *Sullivan;* and *Holloway* v. *Arkansas.* Under the guidelines of *Rule 17* of the *Rules Of The Supreme Court,* both of these issues are important issues of federal law that merit review on Writ of Certiorari.

Respectfully Submitted,

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